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No. 90-582

In The

Supreme Court of the United States

October Term, 1990

BENTON, BENTON & BENTON,
A Professional Law Corporation,

Petitioner,

v.

LOUISIANA PUBLIC FACILITIES AUTHORITY, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF OF RESPONDENT LOUISIANA PUBLIC FACILITIES AUTHORITY IN OPPOSITION

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Supreme Court Rule 15.6. 1

REPLY TO BRIEF OF RESPONDENT LOUISIANA PUBLIC FACILITIES AUTHORITY IN OPPOSITION

Pursuant to Rule 15.6, petitioner, Benton, Benton & Benton, files this reply to address arguments raised in the brief in opposition submitted by respondent Louisiana Public Facilities Authority ("LPFA").[1]

I. The Public Trust Act Does Not Immunize Respondents' Conduct from the Antitrust Laws.

The question of state action immunity hinges on whether the challenged conduct is that of "a state or its officers or agents [engaging in] activities *directed by its legislature*." *Parker v. Brown*, 317 U.S. 341, 350; 63 S.Ct. 307, 313 (1943) (emphasis added). In order to be immune, "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.' " *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48; 105 S.Ct. 1721 (1985). In the instant case, that test simply has not been met.

The respondents cannot point to a single word in Louisiana's Public Trust Act, La. R.S. 9:2341-9:2347 (Petition

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[1] In addition, this reply addresses certain statements of fact that require correction or clarification. Respondent LPFA begins its brief in opposition by suggesting, inaccurately, that petitioner failed to diligently pursue discovery prior to respondents' motions for summary judgment and, therefore, failed to make a record to substantiate its claims. In fact, respondents resisted petitioner's requests for production of documents and petitioner elected to conduct extensive preparation with the assistance of its antitrust experts, including economist Dr. William Moore, Ph.D., through examination of public records in the possession of the Louisiana Bond Commission, the Louisiana Attorney General and the Louisiana Secretary of State, as well as interrogation of third parties having information relevant to petitioner's claims. See Record, pp. 246-279 and pp. 323-336. This extensive evidence, including without limitation, the affidavit of Dr. Moore, appears in the record of this matter. Since this case is before the Court on motion for summary judgment, the evidence must be viewed in the light most favorable to petitioner.

Appendix, pp. 15a-32a), that mentions bond counsel or the manner of selection of bond counsel, or intimates that the legislature "contemplated" the LPFA's anticompetitive activity or suggests that such anticompetitive activity would "foreseeably result" from any other authorized or mentioned activity. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43-44; 105 S.Ct. 1731, 1718-19 (1985). The act is a general statute that authorizes the creation of so-called "public trusts" generally. It does not establish or create the LPFA. The act does not even mention the LPFA.

Respondents attempt to sidestep this fact by obfuscating the state action issues raised by petitioner in this case. First, they argue that immunity does not require specific legislative authorization for the challenged restraint:

> "According to Petitioner, the clear articulation standard should require the Louisiana Legislature solemnly to proclaim, 'The LPFA may repeatedly choose the same law firm to serve as official bond counsel for each financing in which it participates.' Petitioner is wrong." (Brief in Opposition, p. 9)

This argument knocks down a straw man. Petitioner does not argue that such specificity is required. There is not even a *single* sentence from the legislature allowing the LPFA to name bond counsel, or intimating that the legislature "contemplated" anticompetitive activity in such selection, or suggesting that such anticompetitive activity would "foreseeably result" from some articulated authority or power granted the LPFA.

Total silence cannot afford immunity. It is clear that the Louisiana legislature never even imagined that the LPFA would displace competition in the naming of bond counsel.

For precisely this reason the LPFA strains to find a grant of immunity in its indenture of trust prepared by respondent Steve Hicks to create the LPFA in 1974. See Petition, p. 3. The LPFA begins by erroneously suggesting to the Court that the LPFA's indenture has been approved or adopted by the legislature and is presumably thus akin to a statute.[2]

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[2] At p. 5 of their opposition, respondents refer to the present provisions of the Public Trust Act and imply that the LPFA's indenture

(Continued on following page)

Act No. 778 of 1978, merely ratified the governor's acceptance of the "beneficial interest" in "public trusts" generally. Indeed, this legislation does not even mention the indenture or the LPFA, stating simply:

> "The acceptance of the *beneficial interest* by the *Governor* in any public trust which designates as its beneficiary the State of Louisiana or any state agency and which was created prior to September 30, 1974 under the provisions of Act 135 of the 1970 Regular Session of the Louisiana legislature is hereby ratified and confirmed." (emphasis)

Clearly, the legislature did not "enact" the indenture into law.[3]

Respondents next suggest that the indenture, if not a statute, is akin to a regulation promulgated pursuant to a statute. This argument, too, is without merit. The Public Trust Act does not delegate any rule-making or regulatory authority to public trusts. This case is fundamentally unlike *First American Title Company of South Dakota v. South Dakota Land Title Association*, 714 F.2d 1439 (8th Cir. 1983), cert. denied 464 U.S. 1042, 104 S.Ct. 709 (1984) on which respondents rely. That case involved a real regulation by a body to which the power to regulate had been expressly delegated by statute.

Next, respondents declare that acceptance of the beneficial interest in the LPFA "by the state" means that the

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(Continued from previous page)

was approved by the Legislature. This implication is erroneous. At the time the LPFA was formed in 1974, the requirement of legislative acceptance of the "beneficial interest" was not contained in the law. See Act No. 135 of 1970. The requirement of legislative acceptance of the "beneficial interest" was not added to the law until Act No. 699 of 1976. Louisiana's legislature has never received, seen or considered the LPFA's indenture and has never been apprised of its contents. To suggest that the indenture, unexamined by the legislature, constitutes legislative expression of an intent to displace competition for bond counsel services is pure fiction.

[3] In addition, Louisiana Constitution Art. 3, §15(B) prohibits legislative enactment by reference.

indenture somehow became the explicit articulation of state policy regarding the employment of bond counsel. This argument is even more attenuated. The indenture was not issued or enacted by the legislature but drafted by respondents. Therein lies the ultimate flaw in respondents' reliance on the indenture. A state can immunize individuals and entities from antitrust liability *through legislation* containing a "clearly articulated and affirmatively expressed" policy to displace competition with regulation. A state may not, however, authorize persons to fashion their own immunity – as respondents are, in essence, attempting to do here. As stated in *Parker v. Brown*, supra, 317 U.S. at 351, 63 S.Ct. at 314:

> "A state does not give immunity to those who violate the Sherman Act by authorizing them to violate it or by declaring that their action is lawful."[4]

In short, respondents cannot be immunized by legislative silence on the subject in question or by an instrument of their own device. This Court has never so held, and to do so now would expand the state action doctrine to the point of enveloping the Sherman Act itself.

Finally, respondents argue that the instant case presents no novel issue for consideration by this Court because it is consistent with this Court's decisions on the "clear articulation" issue contained in *Town of Hallie*, supra, and *Southern Motor Carriers Rate Conference, Inc.*, supra, as well as other decisions. A review of the cases cited in respondents' brief in opposition demonstrates that in none of these cases did the

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[4] See *Cantor v. Detroit Edison Company*, 428 U.S. 579, 96 S.Ct. 3110 (1976), rejecting a power company's claim that its own tariff could afford it immunity for illegally tying sales of light bulbs to electrical service, even though the tariff had been approved by the Michigan Public Services Commission. Respondents, like Detroit Edison, are attempting to bootstrap their own immunity.

See, also, *Community Communications Company v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835 (1982), in which this Court rejected Boulder's claim that its own ordinances immunized it because Colorado law gave it a general power to enact ordinances.

court find "clear articulation" outside the context of legislative pronouncement. This case presents this Court with the novel question of whether the "clear articulation" standard can be met by language contained in an instrument such as the indenture, and not in a statute.

II. The LPFA is the Type of Entity Properly Subject to the "Active Supervision" Requirement to Qualify for State Action Immunity.

Respondents next argue that the LPFA is akin to a state agency or analogous to a municipality so that the "active supervision" requirement for conferring immunity on private parties does not apply to the LPFA. Alternatively respondents appear to argue that the LPFA is subject to sufficient "active supervision" so as to meet such requirement. According to respondents:

> "The evidentiary function imposed by the active supervision requirement is not necessary here, just as it was not in the *Town of Hallie* and the other cases cited above, because the framework under which the LPFA was created and is administered provides ample security that private actors are not manipulating the laws for unlawful gain." Brief in Opposition, p. 17.

The LPFA's susceptibility to manipulation by respondents for private commercial gain, rather than its status as a public or private entity, should be determinative of whether the "active supervision" requirement is needed for purposes of antitrust immunity. As noted in the original petition, the characterization of an entity as public or private has not proved particularly fruitful in determining whether the active supervision requirement is necessary to ensure compliance by such entity with articulated state policy.

In any event, regardless of whether the LPFA is characterized as a public or private entity, its indenture, which is characterized as a "contract with the state" (La. R.S. 9:2342(A)), expressly stipulates that the state shall have no control over the LPFA's operations. Petition, pp. 3-4. The LPFA urges, in matters that serve its purposes, that it has

complete independence from the state and from any control or supervision by the state.

None of the other legal requirements imposed by statutes on public trusts constitute the LPFA a governmental entity or subject it to active state supervision for purposes of the antitrust laws. Contrary to respondents' assertions, appointment by the governor, taking the oath of office required of public officials and subjection to *some* of the criminal statutes applicable to state officials do not make the trustees " 'public officers' within the executive branch of the Louisiana state government." Brief in Opposition, p. 4. Notaries public in Louisiana (including practically all attorneys in the state) are appointed by the governor, confirmed by the Senate and take an oath of office (La. R.S. 35:1), and though they perform public functions, they are not considered state officials within the traditional meaning of that term. While some criminal statutes applicable to public officers also apply to the LPFA's trustees under the Public Trust Act, others, such as malfeasance in office (La. R.S. 14:136), do not. In addition to the LPFA, certain nonprofit corporations, which also are not governmental entities, are subject to the requirements and provisions of the public contract law, the public meetings law and the public records laws of the state (La. R.S. 12:202.1), and they are not, simply by virtue of being subject to such laws, therefore governmental entities. Additionally, the Louisiana State Bond Commission is required by law to approve the issuance of all bonds exempt from taxation under federal law, regardless of whether such bonds are issued by a public or *private* entity (La. R.S. 39:1405(B)). And, finally, though subject to audit by the Louisiana legislative auditor under the Public Trust Act, the LPFA is not treated like a governmental entity. Its funds are not subject to state control or appropriation and its trustees and employees are not required to conform to the restrictions applicable to government officials. The LPFA's employees are not members of the state civil service and subject to its restrictions. Additionally, the LPFA's trustees and employees are not subject to the regulations and restrictions on travel, meals, lodging and entertainment applicable to all state officials and employees. See La.

R.S. 39:231. Indeed, in defending the lavish expenditures of the trustees and employees of the LPFA with LPFA funds, Chairman Victor Bussie characterized the LPFA as "to some extent a private enterprise". Record, pp. 290-292. The LPFA has not acted nor been treated as a governmental entity for any purposes and has not been subject to any meaningful supervision to ensure that its practices comport with articulated state policy in any respect.

The maintenance of an LPFA bond counsel monopoly is not supervised under any state laws by any state authority or board. Contrary to respondents' suggestion, "infrequent" exercise of powers by the state is not the problem. See Brief in Opposition, p. 5 at note 4. The absolute lack of state power to supervise is the problem.

III. A Conspiracy Exception to *Parker* Immunity Prevents Misuse of the State Action Doctrine to Shield Private Anticompetitive Activity.

Respondents urge the Court to reject a conspiracy exception to *Parker* immunity on the grounds that (i) such exception might trigger antitrust liability whenever a government entity enters into a contract or agreement with a service provider, (ii) such exception is unnecessary, because it is tantamount to a finding of no clear articulation of state policy to displace competition, and (iii) such exception will require federal courts to review the subjective motivation of state actors and the wisdom of state policies.

The assertion that recognition of a conspiracy exception to the *Parker* doctrine will subject every agreement between a governmental entity and a service provider to antitrust scrutiny is, at best, disingenuous. Respondents would have the Court view the provision of bond counsel services as identical to the provision of transportation, sanitation and communication services, which, arguably, might be more efficiently and effectively provided in the public interest by means of exclusive franchises with obvious and predictable anticompetitive effects. The provision of bond counsel services simply does not fit such characterization. Indeed respondents argue elsewhere in their Brief in Opposition that the LPFA "selects its

bond counsel on a transaction-by-transaction basis". See Brief in Opposition, p. 6.

If this were, in fact, the case, then the LPFA would not legitimately fear that each agreement it enters into could trigger potential antitrust liability. Indeed, petitioner does not complain of individual agreements on a transaction-by-transaction basis. Petitioner complains, and the record and admissions of respondents reflect, that LPFA officials have entered into an overarching agreement with Hicks-related firms to contract for their services on each and every transaction undertaken by the LPFA, and it is this agreement that falls outside the scope of antitrust immunity and requires application of a conspiracy exception to the *Parker* doctrine. Respondent Foley, Judell, Beck, Bewley, Martin & Hicks admitted in its "Statement of Material Facts as to Which There is no Genuine Dispute":

> "9. From its inception in 1974, the LPFA has usually selected as bond counsel Steve Hicks and/or the law firm with which he was associated, including the Foley Firm and the McCollister Firm. The LPFA has not selected the Benton Firm as bond counsel on any LPFA transaction to date." Record, p. 131.

Respondents' second contention is that there is no logic to a private conspiracy exception to state action immunity for allegedly "ultra vires" conduct, because such conduct would not meet the clear articulation standard anyway. This argument reflects an extremely superficial analysis of the problem sought to be curbed by recognizing the conspiracy exception for ultra vires acts. As recognized by the 11th Circuit in *Halifax Hospital Medical Center v. Bolt*, 891 F.2d 810 (11 Cir. 1990), cert. denied ___ U.S. ___, 110 S.Ct. 1960 (1990), even in situations where there is a clearly articulated state policy to displace competition, unauthorized and unforeseeable activities undertaken pursuant to a private conspiracy rather than the articulated anticompetitive state policy do not deserve exemption from antitrust scrutiny. Like Dr. Bolt, petitioner in the instant case alleges ultra vires acts by respondents, undertaken pursuant to a private conspiracy rather than in furtherance of any articulated state policy.

Contrary to respondents' suggestion that there is no allegation that the LPFA and other respondents have engaged in ultra vires activities, petitioner has specifically alleged and presented evidence of such activity. Even assuming, *arguendo*, an articulated state policy to displace competition in the selection of bond counsel, surely such actions as coercing project developers to purchase real estate owned by bond attorneys in connection with LPFA bond issues, threatening to deny needed tax-exempt bonding capacity to one of petitioner's municipal clients unless petitioner dropped the present antitrust action, and intimating the possibility of labor unrest in connection with the construction projects of an LPFA project beneficiary, a hospital, which balked at the engagement of a Hicks-related firm as bond counsel, constitute exactly the sort of ultra vires acts that emanate from a private conspiracy subject to the antitrust laws, rather than the legitimate fulfillment of an articulated state policy to displace competition. See Petition, pp. 5-9.

Respondents' final argument opposing this Court's recognition of a conspiracy exception to *Parker* immunity asserts that recognition of such exception will require federal courts to review the subjective motivations of state actors and the wisdom of state policies, inquiries which this Court and subordinate federal courts have historically declined to undertake.

Petitioner has extensively addressed this concern in its original petition for certiorari. In addition, petitioner's "litany of alleged wrongdoing", criticized by respondents as being devoid of antitrust significance (Petition, pp. 6-8; Brief in Opposition, pp. 8, 20), contains glaring evidence of conspiracy for private gain without necessitating any inquiry into the subjective motivations of state actors and the wisdom of state policies. The unique and highly profitable treatment afforded respondent attorneys by the LPFA presents prima facie evidence of improper conspiracy to benefit these attorneys at the expense of their competitors and the public in general. The elements of coercion and abuse of office evidenced by certain

actions of LPFA officials and described in petitioner's "litany" are not worthy of *immunity* from the antitrust laws.[5] Clearly, the instant case amply demonstrates that the LPFA has been captured by and is controlled for the benefit of respondent private attorneys and the recognition of a conspiracy exception does not necessitate examination of subjective motives of government officials or the wisdom of state policies, but can instead be predicated on the same type of evidence and analyzed in the same fashion as any other alleged violation of the antitrust laws. See Petition, pp. 19-22.

CONCLUSION

For the foregoing reasons, as well as the reasons originally urged by petitioner, it is respectfully submitted that this Court should grant petitioner's application for writ of certiorari.

Respectfully submitted,

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[5] See La. R.S. 42:1116 and paragraphs nos. 6 and 8 of Petition, pp. 7-8.